

M/S Mfar Constructions Pvt. Ltd. Vs. Director General(Married Accommodation Project)

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Court : Delhi

Decided On : Nov-30-2012

Judge : Reva Khetrapal

Appellant : M/S Mfar Constructions Pvt. Ltd.

Respondent : Director General(Married Accommodation Project)

Advocate for Def. : Mr. Anuj Agarwal, Mr. Gaurav Khanna

Advocate for Pet/Ap. : Ms. Indu Malhotra, Ms. Mahalakshmi Pavani, Mr. G. Balaji, Mr. Vanshdeep Dalmia, Mr. Kush Chaturvedi

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + ARB.P. 123/2012 M/S MFAR CONSTRUCTIONS PVT. LTD. Petitioner Through: Ms. Indu Malhotra, Sr. Adv. with Ms. Mahalakshmi Pavani, Mr. G. Balaji, Mr. Vanshdeep Dalmia and Mr. Kush Chaturvedi, Advocates. versus DIRECTOR GENERAL (Married Accommodation Project) Through: % Respondent Mr. Anuj Agarwal with Mr. Gaurav Khanna, Advocates. Date of Decision : November 30, 2012 CORAM: HON'BLE MS. JUSTICE REVA KHETRAPAL JUDGMENT : REVA KHETRAPAL, J.

1. The abovementioned petition has been filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 praying for the appointment of a sole Arbitrator to adjudicate on the arbitrable disputes, which have arisen between the petitioner and the respondent.

2. The aforesaid disputes, which have arisen between the petitioner and the respondent relate to a Work Order bearing No. 0012/GPR/BHUB/Contractors/Pkg-14/03 dated 27.07.2010 for the construction of 897 dwelling units at Bhubaneswar and Gopalpur for the Married Accommodation Project (hereinafter referred to as MAP).

3. The contract entered into between the petitioner and the respondent was for the total value of Rs. 91,63,37,224.50 only (Rupees Ninety one crores sixty three lacs thirty seven thousand two hundred twenty four and fifty paise only). The overall period of completion was fixed for a period of 25 months, as the petitioner was required to commence the work on 02.08.2010 and complete it by 01.09.2012.

4. Clause 60 of the General Conditions of Contract stipulated that in case of disputes arising between the parties, the parties shall refer the matter to arbitration. The relevant extract of the aforesaid Clause 60 is reproduced hereinbelow: 60. Arbitration All disputes, between the parties to the contract (other than those for which the decision of the DG MAP or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of serving officer having degree in Engineering or equivalent or having passed Final/Direct Final Examination of Sub Division II of Institution of Surveyors (India) recognized by the Govt of India to be appointed by the Engineer-in-Chief, Army Headquarters, New Delhi or in his absence, the officer officiating as Engineer-in-Chief or Director General of Works if specifically delegated in writing by Engineering-in-Chief, Army Headquarters, New Delhi whose decision shall be final, conclusive and binding. The Arbitration shall be governed by the Arbitration and Conciliation Act, 1996. Unless both parties agree in writing, such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 49 and 50 hereof. Provided that in the event

of abandonment of the works or cancellation of the Contract under Conditions Nos. 46, 47 or 48 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies. Provided always that commencement or continuance of any Arbitration proceedings hereunder or otherwise shall not in any manner militate against the Governments right of recovery from the Contractor as provided in Condition 57 hereof. (emphasis supplied) 5. Disputes having arisen between the parties, the petitioner invoked the aforesaid Arbitration Clause through various letters dated 26.04.2011, 12.05.2011 and 13.06.2011 written by the petitioner. The petitioner was finally constrained to determine the Contract with the respondent by a letter dated 21.09.2011 without completion of the project, stating therein that the petitioner had suffered huge losses in view of the failure of the projects solely due to the negligent act of the respondent in not handing over all the sites for construction and once again requesting the respondent for appointment of an Arbitrator. The respondent replied to the aforesaid letter on 27.10.2011, refusing to appoint an Arbitrator by stating:9. It is an agreed condition that arbitration cannot be invoked unless the work is physically completed without mutual consent of both the parties. Since no ambiguity existed in the disputes raised by you no decision is pending from the Accepting Officer, our concurrence remained a tacit refusal.

6. In view of the aforesaid refusal of the respondent to initiate arbitration proceedings, the petitioner was left with no option except to file the present petition on 15.03.2012 for appointment of an arbitrator.

7. The respondent filed its affidavit opposing the prayer made in the petition, paragraph 4 whereof states as follows:4. That by way of this Short Affidavit, the Respondent submits that the Arbitrator in the present matter, may be ordered to be appointed, in terms of the Arbitration Clause i.e. Clause 60 of the General Conditions of the Contract, by the Engineer-in-Chief, Army Headquarters, New Delhi or in his absence, the officer officiating as Engineer-in-Chief or Director General of Works if specifically delegated in writing by Engineering-in-Chief, Army Headquarters, New Delhi.

8. Arguments were addressed by Ms. Indu Malhotra, learned senior counsel on behalf of the petitioner and Mr. Anuj Agarwal, learned counsel on behalf of the respondent. It was submitted by Ms. Indu Malhotra that the right of the respondent to appoint the arbitrator stands forfeited on the petitioner filing the present petition for appointment of an arbitrator before this Court. Specific reliance was placed by her on the judgment of the Honble Supreme Court in *Datar Switchgears Ltd. vs. Tata Finance Ltd. and Another* (2000) 8 SCC 151, wherein it is held as under: 19. So far as cases falling under Section 11 (6) are concerned such as the one before us no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11 (4) and Section 11 (5) of the Act. In our view, therefore, so far as Section 11 (6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11 (6) is forfeited. (emphasis supplied) 9. Ms. Malhotra also placed reliance upon a three-Judge Bench decision of the Supreme Court in *Punj Lloyd Ltd. Vs. Petronet MHB Ltd.* (2006) 2 SCC 63, in which the judgment in *Datar Switchgears Ltd.* (supra) has been reaffirmed. Reference was also made by her to the judgment of the Honble Supreme Court in *Denel (Proprietary) Limited Vs. Ministry of Defence* (2012) 2 SCC 759. In the said case, applying the dicta laid down in *Datar Switchgears Ltd.* (supra), it has been held by the Honble Supreme Court that the respondents had lost the right to appoint an arbitrator as the respondents had failed to appoint an arbitrator before the petitioner moved the Court for such appointment. Hence, the appointment of arbitrator by the respondents subsequent to the filing of the

petition was held to be unsustainable and was set aside, and an independent arbitrator was appointed as sole arbitrator to decide all the disputes between the parties.

10. It is submitted by Ms. Malhotra that the respondents contention that only a serving officer can be appointed by the Engineer-in-Chief, Army Headquarters, New Delhi as an arbitrator in the present case is wholly devoid of any merit, and deserves to be rejected for the following reasons:(a) Firstly, the respondents right to appoint its own Officer as an Arbitrator stands forfeited for the reason indicated hereinabove. (b) Secondly, any serving Officer of Indian Army appointed as an arbitrator is bound to be subordinate in rank to the Director General, MAP who himself is a senior serving Officer in the Indian Army. The petitioner has genuine and serious apprehensions about the impartiality and independence of a serving Officer being appointed as an Arbitrator. In the case of Denel (Proprietary) Limited vs. Bharat Electronics Ltd. and Anr. (2010) 6 SCC 394.the Honble Supreme Court while appointing an independent Arbitrator other than the Managing Director of the respondent Company, opined as under:21. However, considering the peculiar conditions in the present case, whereby the arbitrator sought to be appointed under the arbitration clause, is the Managing Director of the Company against whom the dispute is raised (the Respondents). In addition to that, the said Managing Director of Bharat Electronics Ltd. which is a Government Company, is also bound by the direction/instruction issued by his superior authorities. It is also the case of the respondent in the reply to the notice issued by the respondent, though it is liable to pay the amount due under the purchase orders, it is not in a position to settle the dues only because of the directions issued by the Ministry of Defence, Government of India. It only shows that the Managing Director may not be in a position to independently decide the dispute between the parties.

11. Per contra, learned counsel for the respondent in the course of his submissions sought to place reliance on the proviso to Clause 60 of the Contract which is reproduced hereunder for the facility of ready reference:Provided that in the event of abandonment of the works or cancellation of the Contract under Condition Nos. 46, 47 or 48 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works

completed by or through any other Contractor or Contractors or Agency or Agencies.

12. It was submitted that as per the aforesaid proviso to Clause 60 of the General Conditions of Contract, in the event of abandonment of the works or cancellation of the contracts under Condition Nos. 46, 47 or 48 thereof, the reference as stipulated in Clause 60 of the General Conditions of Contract is not liable to take place until alternative arrangements are finalized by the Government to get the works completed by or through any other contractor or contractors or agency or agencies. It was thus submitted that the present petition is misconceived as no occasion has arisen so far for reference of disputes to arbitration, in that, although the respondent has already issued Risk and Cost tender to get the balance work executed at the risk and cost of the respondent, yet the exact amount of such loss can only be ascertained after finally awarding the said tender, which process is still to be completed.

13. On a specific query put by this Court to the counsel for the respondent with reference to Condition Nos. 46, 47 and 48 of the General Conditions of Contract, which relate to the cancellation of contract for insolvency of the contractor, sub-letting of the contractor, contractors default and contractors death, learned counsel for the respondent was unable to demonstrate that any of the aforesaid conditions existed to enable the Accepting Officer to cancel the contract. On the other hand, the learned counsel for the petitioner pointedly stated that the contract had been cancelled not by the respondent but by the petitioner/contractor on account of nonavailability of sites. As a matter of fact, it is the case of the petitioner that the handing over of the sites was supposed to be completed by 27.07.2010, but on the said date only one site was handed over to the petitioner, and the respondent has not handed over the sites at Bhubaneswar to the petitioner even till date.

14. Learned counsel for the petitioner in rejoinder contended that the respondent was guilty of suppression of material facts in so far as the fact that the respondent was not in possession of the sites was not disclosed to the petitioner at the time of entering into the contract. Since it was a time bound contract to be completed within 25 months from the date of commencement, that is, 02.08.2010, if the

respondent had indicated that the sites were not in their possession on the date of inviting the tenders, the petitioner would not have entered into the contract at all. A perusal of the tender documents reveals that various clauses represented that the Sites Were Ready For Handing Over.

15. Be that as it may, it clearly emerges from the affidavit of the respondent and in fact it was candidly stated by the counsel for the respondent at the time of hearing that an Arbitrator may be appointed by this Court in terms of Clause 60 of the General Conditions of the Contract. The only bone of contention, however, was that while the petitioner wanted an independent and impartial arbitrator to be appointed, the respondent insisted upon the appointment of an arbitrator by the Engineer-in-Chief, Army Headquarters, New Delhi or in his absence, the officer officiating as Engineer-in-Chief or Director General of Works if specifically delegated in writing by the Engineer-in-Chief, Army Headquarters, New Delhi and that too a serving officer having a degree of Engineering or equivalent or having passed Final/Direct Final Examination of Sub-Division II of Institution of Surveyors (India) recognized by the Government of India.

16. While this Court is conscious of the fact that while exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996, the Court has to give due regard to any qualifications, which the Arbitrator is required to possess under the contract between the parties and of the fact that the aforesaid requirement is explicitly laid down in Section 11(8) read with Sections 12(3)(b) & 34(2)(a)(v) of the Arbitration and Conciliation Act, 1996, at the same time the law is well settled that it is not incumbent upon the Court to appoint the arbitrator(s) named in the agreement [See Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Co. Ltd., (2008) 10 SCC 24. wherein it is held that in exercise of its jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996, which the Court has to give due regard to any qualifications which the Arbitrator is required to possess under the contract between the parties as mandated by the two cumulative conditions contained in Section 11(8)(a) and 11(8)(b), appointment of the arbitrator or arbitrators named in the agreement is not a must]. The provisions of Section 11(8)(a) and (b) which are opposite read as follows: The Chief Justice or the person or institution designated by him, in

appointing an arbitrator, shall have due regard to (a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

17. A perusal of Clause 60 (supra) in the present case specifies that the only qualifications, which an arbitrator is required to possess under the present agreement between the parties are:(a) (b) 18. a degree of Engineering or equivalent; or having passed Final/Direct Final Examination of Sub-Division II of Institution of Surveyors (India) Recognized by the Govt. of India. In view of the aforesaid legal and factual position, and having regard to the serious apprehension of the petitioner as to the nonimpartiality of a serving officer being appointed as an arbitrator, the insistence of the respondent for the appointment of a serving officer by the Engineer-in-Chief or Director General of Works, Army Headquarters and that too after the forfeiture of respondents rights to appoint its own officers, in the opinion of this Court, is wholly misconceived. Accordingly, this Court appoints Mr. Amrit Lal Aggarwal, retired Chief Engineer, MCD, resident of Block not C-4-A, Flat No.1-A, Janak Puri, New Delhi-58 (Mob.9811100361) as an arbitrator to arbitrate upon the disputes between the parties. ARB.P.123/2012 arbitration shall take place under the aegis of Delhi High Court Arbitration Centre. The fees of the Arbitrator shall be in terms of the Delhi High Court Arbitration Centre (Arbitrators Fees) Rules.

19. The petition stands disposed of in the above terms. List before the Delhi High Court Arbitration Centre on 10.12.2012. REVA KHETRAPAL JUDGE November 30, 2012 sk

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